United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

DOCKET NO. 75-1341

IN THE

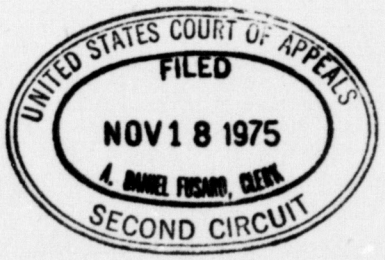
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	:	APPELLEE
V.	:	
STEVEN JOHN MURRAY	:	APPELLANT

Appeal from the United States District
Court for the District of Vermont

APPENDIX FOR THE APPELLANT



William K. Sessions III
Public Defender for Addison County
18 South Pleasant Street
Middlebury, Vermont 05753

PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

Cr. 75-20

COPY

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT	*For U.S.:* U. S. Attorney *For Defendant:* (APP) William K. Sessions, III, Esq P.O. Box 423, Middlebury, Vt. for Steven John Murray Richard B. Hirst, Esq. (APP) Drawer 351, Middlebury, Vt. for Arthur J. Gibeault

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 2 mailed ~~MAR 5 1975~~	Clerk								
J.S. 3 mailed OCT 3 1975	Marshal								
Violation	Docket fee								
Title 18 USC									
Sec. 2,371,641 & 2115									

DATE 1975	PROCEEDINGS	
Feb. 6	Filed Indictment for violation of Sections 2, 371, 641 & 2115, Title 8, USC.	1.
" "	" Record of Grand Jurors concurring.	
" 18	Issued Warrant for Arrest of Deft. Murray.	
" "	Issued Summons as to Deft. Gibeault returnable 3-3-75, 11:30 A.M. at Burlington.	
March 3	Filed Financial Affidavit as to Deft. Steven John Murray.	2.
" "	" Appointment of William K. Sessions, III, Esq. for Deft. Steven John Murray.	3.
" "	" Waiver of Defendant Steven John Murray's Presence.	4.
" "	" Financial Affidavit as to Deft. Arthur Joseph Gibeault.	5.
" "	" Appointment of Richard B. Hirst, Esq. for Arthur Joseph Gibeault.	6.
" "	" Waiver of Defendant Joseph Arthur Gibeault's Presence.	7.
" 3	In open Court before Judge Coffrin, defendant Steven John Murray present with his attorney, William Sessions, Esq. for arraignment. George W. F. Cook, Esq. for Government.	
" "	Court makes inquiries of defendant Murray.	
" "	Defendant waives reading of Indictment and enters a plea of not guilty as to Cts. 1, 2, 3, 4 & 5.	

DATE 1975	PROCEEDINGS	
Mar. 3	Defendant Arthur Joseph Gibeault present with his attorney, Richard B. Hirst, Esq. for arraignment. George W. F. Cook, Esq. for Government.	
" "	Court makes inquiries of defendant Gibeault.	
" "	Defendant waives reading of Indictment and enters a plea of not guilty as to Cts. 1, 2, 3, 4 & 5.	
" "	Ordered: bail set at $ 2,500.00 as to each defendant and defendants released on their own recognizance.	
" "	Court suggests that parties file motions as soon as possible.	
" 3	Filed Appearance Bond as to Defendant Steven John Murray -- $ 2,500.00 and released on his own recognizance.	8.
" "	" Appearance Bond as to Defendant Arthur Joseph Gibeault -- $ 2,500.00 and released on his own recognizance.	9.
Mar. 4	Filed Summons returned served.	10.
" 10	" Govt's Notice of Readiness for trial.	11.
June 5	" Deft's Motion for Discovery & Memorandum. (Murray's)	12.
" "	" Deft. Murray's Motion for Severance of Defts & Memorandum.	13.
" "	" " " " to Suppress & Memorandum.	14.
" 9	" Deft's Motion to Suppress & Memorandum.	15.
" 13	" Govt's Response to Motion to Deft. Murray for Discovery and Memorandum of Points and Authorities.	16.
" "	" Govt's Response to Motion of Deft. Gibeault for Discovery.	17.
" "	" Govt's Bill of Particulars.	18.
" "	" Govt's Response to Motion for Deft. Murray for Severance of Defts.	19.
" 16	In Court before Judge Coffrin. Jerome O'Neill, Esq. for Govt; William K. Sessions, Esq. for Deft. Murray; Richard B. Hirst, Esq. for Deft. Gibeault. Defts. present in Court with their attys.	
" "	Hearing on Defendant Murray's Motion for Discovery.	
" "	Statements made to Court by Mr. Sessions followed by Mr. O'Neill who states that everything has been furnished Deft's counsel.	
" "	ORDERED: Motion denied.	
" "	Hearing on Deft. Gibeault's Motion for Discovery.	
" "	Mr. Hirst states that documents will and/or have been furnished.	
" "	Hearing on Deft. Murray's Motion for Severance.	
" "	Statements made by Mr. Sessions and Mr. O'Neill.	
" "	Decision reserved.	
" "	Michael LeClair, sworn by Clerk was examined by Mr. O'Neill; cross-examined by Mr. Sessions, followed by Mr. Hirst.	
" "	Re-examined by Mr. O'Neill. Re-cross by Mr. Sessions.	
" "	Re-examined by Mr. O'Neill; re-cross by Mr. Sessions and Mr. Hirst. Re-examined by Mr. O'Neill.	
" "	Steven John Murray, sworn by Clerk was examined by Mr. Sessions; cross-examined by Mr. O'Neill.	
" "	Joseph Arthur Gibeault, sworn by Clerk, was examined by Mr. Hirst; cross-examined by Mr. Sessions; followed by Mr. O'Neill.	
" "	Mr. O'Neill makes closing arguments to Court; followed by Mr. Sessiosn and Mr. Hirst.	
" "	Court makes inquiries of Mr. O'Neill.	
" "	Decision reserved.	
" "	ORDERED: Government to file memorandum no later than June 18, 1975. Trial continued for one week.	
" 16	Filed Government's subpoena to testify returned served.	20.
" 18	" Govt's ~~subpoena to~~ testify returned served.	21.

See Next Pa

Cr. 75-20 U.S. v. Gibeault & Murray

DATE 1975	PROCEEDINGS
June 19	Filed Deft. Gibeault's Memorandum of Law. 22.
" "	" Govt's opposition to Motions to suppress and Memorandum of Points and Authorities. 23.
" 20	" Order -- Deft. Murray's Motion for Discovery denied for reasons statedat hearing; Deft. Gibeault's Motion for Bill of Particulafs denied for reasons stated at hearing; Deft. Murray's Motion to Suppress & Deft. Gibeault's Motion to Suppress are denied with a brief written opinion as to reasons therefor to follow in due course; Deft. Murray's Motion for Severance of defts., in which Deft. Gibeault & USA concurred, is granted for reasons stated in Motion & defts. shall be tried separately. Further Ordered: Deft. Arthur Gibeault shall be tried prior to deft. Murray; such trial of deft. Gibeault to commence on 6-24-75 at 9:30 AM. Mailed copy to attys. 24.
" 25	Filed Opinion. Mailed copy to attorneys. 25.
" "	In Court before Judge Coffrin. David Reed, Esq. for Govt.; Richard B. Hirst, Esq., for Deft. Gibeault. Deft. present in Court with his attorney for Change of Plea as to Ct. II.
" "	Deft. Gibeault asks, has leave of Court to, and does withdraw his plea of not guilty as to Count II and pleads guilty.
" "	Court makes inquiries of Deft. and Mr. Hirst.
" "	Mr. Reed states facts of case to Court.
" "	ORDERED: That plea of guilty be accepted by the Court as to Count II; that a pre-sentence investigation report be made and that bail be continued as previously fixed, as to Deft. Gibeault.
	Steven John Murray
July 21	In open Court before Judge Coffrin, defendant present with his attorney, William K. Sessions, III, Esq. for change of plea as to Count I. David Reed, Esq. for Government.
" "	Defendant asks, has leave of Court to, does withdraw his plea of not guilty and enters a plea of guilty as to Count I.
" "	Court makes inquiries of defendant.
" "	Statements made to Court by Mr. Reed and by Mr. Sessions.
" "	Ordered: that plea of guilty be accepted by the Court; bail continued as previously fixed; presentence investigation be made.
" 29	Filed Authorization to incur expense of office machines appraisal. 26.
Aug. 21	Filed Warrant for Arrest of Defendant Murray returned unserved. 27.
Sept. 15	In Court before Judge Coffrin. David Reed, Esq. for Govt.; William K. Sessions, III, Esq. for Deft. Murray; Richard B. Hirst, Esq. for Deft. Gibeault.
" "	Deft. Gibeault present in Court with his attorney for Sentence on Count II.
" "	Raymond Mohan and Olive M. Mohan, sworn by Clerk, were examined by Mr. Hirst.
" "	Statements made to Court by Mr. Hirst and by Mr. Reed.
" "	Filed Judgment and commitment--Deft. Gibeault adjudged a Young Adult Offender under §4209, T 18, U.S.C., but one who will not benefit from treatment under the YCA. Deft. committed to custody of Atty. Gen. for a period of 3 yrs; all but 6 months is suspended and Deft. placed on probation for a period of 3 yrs. 28.
" "	Mr. Reed moves to dismiss the remaining counts of Indictment as to Deft. Gibeault.

DATE 1975	PROCEEDINGS
Sept. 15	ORDERED: Motion granted.
" "	Deft. Murray present in Court with his attorney for Sentence on Count I.
" "	Statements made to Court by Mr. Session, by Mr. Murray and by Mr. Reed.
" "	Statements made by Mr. Picher.
" "	Filed Judgment and commitment--Deft. Murray adjudged a Youth Offender under §5006(e), T 18, U.S.C., but one who will not benefit from treatment under the YCA. Deft. committed to custody of Atty. Gen. for a period of 3 yrs; all but 6 months is suspended. Execution of remainder of sentence is suspended and Deft. placed on probation for a period of 3 yrs. Sentence imposed to begin upon release from state confinement. 29.
" "	Mr. Reed moves to dismiss the remining counts of Indictment as to Deft. Murray.
" "	ORDERED: Motion granted.
" 24	Filed Defendant's Motion for Reduction of Sentence. 30
" 25	" Deft. Murray's Notice of Appeal. Mailed copy to U. S. Atty., William K. Sessions, III, Esq., Richard B. Hirst, Esq., Court Reporter, Judge Coffrin and Clerk, U. S. Court of Appeals for the Second Circuit. 31
" 26	" CJA 21 - Ruthorization & Voucher for Services. 32
" 29	" Memorandum of Law in support of Deft. Gibeault's Motion for Reduction of Sentence. 33
Sept. 29	In open Court before Judge Coffrin, hearing on defendant/ Gibeault's motion for reduction of sentence. David Reed, Esq. for Govemment; Richard B. Hirst, Esq. for Defendant Gibeault. Deft. Gibeault not present.
" "	Statements made to Court by Mr. Hirst and by Mr. Reed.
" "	Ordered: Motion denied.
Oct. 3	Mailed Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit. Attys. notified.
" 6	Filed Scheduling Order from U. S. Court of Appeals. 34.
" 10	" Certified copy of Judgment returned served--Deft. Gibeault delivered to Rutland Cor. Ctr. on 10-7-75. 35.
" 20	" Transcript of Hearing on Deft. Murray's Motions for Discovery; for Severance of Defts; and to Suppress; and on Deft. Gibeault's Motion to Suppress held 6-16-75.
" 21	Mailed Supplemental Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, N. Y., N. Y. Attys. notified.

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

UNITED STATES OF AMERICA v. STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT	Criminal No. 75-20 18 U.S.C. §§ 2, 371, 641 and 2115

COUNT I

The Grand Jury charges:

From on or about November 1, 1973, up to and including January 23, 1975, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT, the defendants, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together with each other and with other persons to the Grand Jury unknown, to commit offenses against the United States, to wit, to violate sections 641 and 2115 of Title 18, United States Code. It was part of the conspiracy that defendants STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT would willfully and knowingly steal, purloin and convert to their own use and the use of others United States Postal Service equipment of the value of more than $100.00, the United States Postal Service being a department and agency of the United States; in violation of section 641, Title 18, United States Code.

Filed February 6, 1975
Faith L. Hunter
Deputy Clerk

It was further a part of the conspiracy that defendants STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT would willfully and knowingly forcibly break into and attempt to break into Post Offices with intent to commit larceny in such Post Offices; in violation of Section 2115, Title 18, United States Code.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed in the District of Vermont:

1. On or about December 21, 1974, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT rode in an automobile together.

2. Between December 24, 1974 and January 3, 1975, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT went to a store in Pittsford, Vermont.

(Title 18, U.S.C. § 371).

COUNT II

The Grand Jury further charges:

On or about December 21, 1974, in the District of Vermont, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT, the defendants, unlawfully, willfully and knowingly did forcibly break into and attempt to break into a Post Office of the United States at Shoreham, Vermont, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT then intending to commit larceny in such Post Office of the United States; in violation of Sections 2115 and 2 of Title 18, United States Code.

COUNT III

The Grand Jury further charges:

On or about the 21st day of December, 1974, in the District of Vermont, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT, the defendants, unlawfully, willfully and knowingly did steal, purloin and knowingly convert to their own use things of value of the United States from the Shoreham Post Office of the United States Postal Service, a department and agency of the United States, of the value of more than $100.00; in violation of Sections 641 and 2 of Title 18, United States Code.

COUNT IV

The Grand Jury further charges:

On or about December 21, 1974, in the District of Vermont, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT, the defendants, unlawfully, willfully and knowingly did forcibly break into and attempt to break into a Post Office of the United States at Bridport, Vermont, STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT then intending to commit larceny in such Post Office of the United States; in violation of Sections 2115 and 2 of Title 18, United States Code.

COUNT V

The Grand Jury further charges:

On or about the 21st day of December, 1974, in the District of Vermont. STEVEN JOHN MURRAY and ARTHUR JOSEPH GIBEAULT, the defendants, unlawfully, willfully and knowingly did steal, purloin and knowingly convert to their own use things of value of the United States from the Bridport Post Office of the United States Postal Service, a department and agency of the United States, of the value of more than $100.00; in violation of Sections 641 and 2 of Title 18, United States Code.

A TRUE BILL

Clayton A. Watson
Foreman

GEORGE W.F. COOK
UNITED STATES ATTORNEY

By Jerome F. O'Neill
JEROME F. O'NEILL
ASSISTANT U.S. ATTORNEY

Feb. 6, 1975

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

United States of America	:	
	:	
v.	:	Criminal No. 75-20
	:	
Steven John Murray and	:	
Arthur Joseph Gibeault	:	

OPINION

Separate motions to suppress evidence filed by the defendants in the above cause were denied by the Court by order filed June 20, 1975. The reasons for denying said motions are set forth in this brief opinion.

Findings of Fact

On January 21, 1975, the defendants drove past the East Middlebury State Police barracks in Gibeault's van, which had a faulty muffler. As they passed the barracks, Gibeault revved up the engine, thereby generating sufficient noise to attract the attention of Trooper Michael LeClair who was standing outside the barracks. He interpreted this action as an act or gesture of harassment. LeClair then proceeded to follow the defendants in his patrol car, and he shortly observed the defendants' van swerve to the left of the center of the highway. Taking the act of harassment and the driving left of center together, LeClair suspected that the operator--who later proved to be Gibeault--may have been drinking. Consequently he decided to stop the vehicle to investigate a possible D.W.I. violation. Accordingly he had the van pull to the side of the road and parked his cruiser. He then got out of his car and as he approached the defendants' vehicle

he routinely shined his flashlight into the rear of the van as a basic safety precaution and standard state police procedure. He observed no one in the van except defendants Gibeault and Murray, but he did see three pillowcases which appeared to have been thrown into the back and which contained some glassware and at least one silver plated item. He then approached the van on the driver's side and examined Gibeault's license and registration. At this time he detected an order of intoxicants on Gibeault and took him back to the cruiser to ask him some questions relative to the suspected D.W.I. offense and to the glassware in the back of the van. He also frisked defendant Murray and found a hard object in his jacket pocket which turned out to be a "drug" pipe which he knew by sight and smell to be used for marijuana. A further search of Murray disclosed two small packets of marijuana. He then arrested Murray for possession of marijuana. Both defendants were advised of their Miranda rights. Defendant Murray indicated he understood his rights and refused to answer any questions. Defendant Gibeault also stated that he understood his rights, but he did answer some of LeClair's questions. Specifically, when asked about the glassware, Gibeault stated that it was some "junk" given to him by his father when his father moved from his house, to take to the dump. LeClair then took another look in the van; this time he opened the doors and looked more closely at the glassware. Gibeault apparently indicated at first that it would be all right for LeClair to enter the van, but as he was opening the rear doors he inquired if he had a warrant. It is undisputed that LeClair had no warrant, and the Court

considers that there is insufficient evidence to show that Gibeault consented to the search.

After calling another Trooper to assist him, LeClair took both defendants and the van back to the police barracks, where Gibeault was again given his Miranda rights and processed for D.W.I., including the giving of a breath test. LeClair also called Mr. Gibeault, Sr. by phone who denied having given Gibeault any glassware. While LeClair continued to interrogate Gibeault about the glassware and about several break-ins in which he was suspected, other Troopers searched the van and removed not only the pillow-cases which were found to contain expensive glassware and some silverware and jewelry but also a distinctive silver wedding bell which was found in the glove compartment. LeClair confronted Gibeault with the bell together with a picture of the bell which had been provided by its owners. LeClair also stated that the owner could come down to the station to identify the bell, but it is not clear from the evidence whether he actually did so. In any event, after discovering that the police had found the bell, Gibeault agreed to give a statement implicating himself and the defendant Murray in four break-ins--the Nason home from which they had earlier stolen the bell, a white house at Lake Dunmore and two camps on that day, the proceeds from which were in the pillowcases. In both his oral and written statement Gibeault indicated that his rights had been explained to him and that he understood them.

During the next two days, Gibeault gave further statements, confessing to a total of eleven break-ins,

including the two charged in this case at the Bridport and Shoreham Post Offices. He also took the police to where the postal equipment was hidden and they recovered it at that time.

Discussion

Both defendants moved to suppress Gibeault's statement implicating them in the offenses charged in this case and the evidence recovered as a result thereof. Their claim is that the statement and discovery of incriminating evidence resulted from Gibeault's initial admission at the police station which they claim was unconstitutionally extracted.

First, Gibeault contends that his statement was involuntary because he was too intoxicated to waive his rights. In support thereof, he testified that he had smoked some "pot" upon arising and had been drinking more or less constantly during the day preceding his arrest. Furthermore he argues that the fact that he intentionally harassed Trooper LeClair by revving his engine as he went by the police barracks indicates that his judgment was faulty, particularly since the proceeds of two break-ins were in plain view in the back of the van. And, of course, he was stopped and processed for a D.W.I. violation. The test that he took indicated that he had 0.12 percent of alcohol in his breath which raises a presumption under the Vermont motor vehicle laws that a person is under the influence of intoxicating liquor.[1/] Nevertheless, the Court does not believe, based upon the evidence, that Gibeault was so

intoxicated that the waiver of his Miranda rights was not knowing, intelligent, and voluntary. Although Gibeault testified that he had quite a lot to drink that day, he offered no testimony to the effect that he was drunk or that he was confused or that he failed to understand what was explained to him. Trooper LeClair testified that he had no difficulty communicating with Gibeault, that Gibeault had no apparent difficulty remembering the details of the crimes as related in his statement and that Gibeault reviewed his written statement, making and initialing corrections. Furthermore his signature as it appears at six different places on the statement appears consistently the same and outwardly, at least, does not appear to be made by a person who is suffering from an impaired ability to write.[2] Although the breath test indicated a presumption of intoxication, the amount of alcohol in a persons blood stream may have differing effects on different people and consequently the breath test is not used as conclusive evidence of intoxication. State v. Adams, 131 Vt. 413 (1973). Furthermore, intoxication for the purposes of the motor vehicle laws, which are concerned primarily with a driver's physical capabilities, may have little direct relationship to determining whether or not a person understands what he is doing so that he intelligently waives his rights. In this case, viewing the evidence as a whole, the Court is convinced that the defendant Gibeault was not so intoxicated that the waiver of his rights was not knowing, intelligent and voluntary. The defendant relies upon Logner v. State of North Carolina, 260 F. Supp. 970 (M.D.N.C. 1966),

but the evidence of drunkenness in that case was overwhelming, and consequently the facts there were significantly different from the case at bar. Although each case ultimately must be resolved on its own particular facts, this case more closely resembles United States v. Lamia, 429 F.2d 373 (2d Cir. 1970), in which the court rejected the defendant's argument that the waiver of his rights was not knowing and voluntary. We think the evidence clearly establishes that Gibeault had control of his mental faculties and knew what he was doing when he waived his rights and gave his statement at the police station on January 21, 1975.

Gibeault and defendant Murray also urge the suppression of Gibeault's statement on the basis that it was the fruit of an unlawful search. As stated earlier, it is undisputed that LeClair did not have a warrant or either defendants' consent when he first searched the car on the highway. Nevertheless, the Government argues that the search was legal under the "automobile exception" to the warrant requirement. See Carroll v. United States, 267 U.S. 132 (1925). If it was a lawful search on the highway, then the subsequent search at the police station was also lawful under Chambers v. Maroney, 399 U.S. 42 (1970). See also United States v. Carneglia, 468 F.2d 1084 (2d Cir. 1972).

The so-called "automobile exception" authorizes warrantless searches in cases in which both probable cause and "exigent circumstances" exist. See generally, W. Ringel, Searches & Seizures Arrests and Confessions § 291.01, Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835 (1974). This exception to the warrant requirement

traditionally has been justified on the basis that automobiles and other vehicles could be "quickly moved out of the locality or jurisdiction in which the warrant must be sought" and the evidence contained therein would be lost. See Carroll v. United States, supra, 267 U.S. at 153, Chambers v. Maroney, supra. In Chambers the court extended the exception to cover searches after the car had been taken from the highway to the police station, despite the decreased likelihood of flight or removal from police control. Where there is no probability of the vehicle being removed and the evidence taken away, and thus no exigent circumstances, the Supreme Court's opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971) seems to indicate that the automobile exception is inapplicable.

The defendants rely upon Coolidge and assert that there was no possibility of anyone removing the van or its contents during the time it would take the police to obtain a search warrant. It is true that factually this case is somewhat different from Carroll and its progeny in that here there was a basis for detaining the defendants (Gibeault for D.W.I.; Murray for possession of Marijuana) independent of the existence of any potential evidence that may have been in the vehicle. Thus theoretically at least, the police could have detained the defendants on those independent charges while proceeding to obtain a warrant. Obviously if the defendants were in custody, they would not have the opportunity to move the van or secret the evidence. Nevertheless, there is the distinct possibility that some unidentified and unknown compatriot could have obtained access

to the van. See, e.g., United States v. Ellis, 461 F.2d 962 (2d Cir.), cert. denied, 409 U.S. 866 (1972).

Furthermore, subsequent to the Coolidge opinion, the Supreme Court has placed less emphasis on the exigent circumstances element of the automobile exception. In Cady v. Dombrowski, 413 U.S. 433 (1973), for example, the Court upheld the warrantless search of the defendant's automobile even though the defendant was arrested and the police had custody of the car. As in the case at bar, the defendant had originally been detained on the charge of drunken driving and not with offenses related to the evidence subsequently found in the car. In discussing the "exigent circumstances" or mobility requirements the court stated

> Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former, . . . warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicles being removed or evidence in it destroyed were remote, if not nonexistent. The constitutional difference between searches of and seizures from homes and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in "plain view" of evidence, fruits or instrumentalities of a crime, or contraband. 413 U.S. at 441-42 (emphasis added, citations omitted).

Similarly, in Cardwell v. Lewis, 417 U.S. 583 (1974), the court upheld the warrantless search of the defendant's automobile despite the fact that the defendant was in custody, the keys had been turned over to the police and the vehicle had been impounded. In Cardwell the court emphasized that part of the justification for the automobile exception was that "one has a lesser expectation of privacy in a motor

vehicle." Certainly the dissenting opinions in both cases express the view that the court has abandoned or ignored the exigent circumstances requirement. See, e.g., Cardwell, supra, 417 U.S. at 597-98 (dissenting opinion of Stewart, J); Dombrowski, supra, 413 U.S. at 451 (dissenting opinion of Brennan, J). See also C. Antieau, Modern Constitutional Law § 2:8 (supp 1974): "[the dissenters in Cardwell] are correct, it is suggested, in indicating that there were no exigent circumstances here to justify disregard of the general rule [that a warrant is required.]"

In any event, the court is convinced that the automobile exception does apply to this case because exigent circumstances exist, see, e.g., United States v. Ellis, 461 F.2d 962 (2d Cir.), cert. denied, 409 U.S. 866 (1972), and because this case falls within the scope of Cardwell and Dombrowski, supra.

Having determined that the automobile exception applies, we must go on to determine whether or not there was probable cause sufficient to justify the initial search of the van. Trooper LeClair testified that Murray and Gibeault were under investigation for several break-ins in the Middlebury, Vermont, area and that he had in fact interviewed them in that connection. He knew that Gibeault had been convicted of armed robbery and that Murray had a substantial criminal record and was considered "dangerous." During the course of his investigations he discovered that a green van-type vehicle had been seen near one of the homes that had been broken into at the approximate time of the break. This description matched Gibeault's van. His investigation

had disclosed that in several previous break-ins the stolen property had been carried off in pillowcases found in the houses. He also had received a tip from an informant that Murray and Gibeault had possession of some expensive glassware.

LeClair knew the foregoing information at the time he stopped the defendants on January 21. When he approached the vehicle he saw in plain view three pillowcases containing glassware which appeared to have been carelessly or hurriedly thrown into the back of the van.

In determining probable cause, the test is "whether ordinary, reasonable men, possessed of the experience and knowledge of [Trooper LeClair] would conclude that the transaction . . . was more likely than not a criminal transaction." United States v. Wabnik, 444 F.2d 203, 205 (2d Cir. 1971), cert. denied, 404 U.S. 851. In this case we feel that this test has clearly been met, particularly in light of LeClair's observation of suspected stolen property in plain view in the back of the van. See United States v. D'Avanzo, 443 F.2d 1224, 1226 (2d Cir. 1971), cert. denied, 404 U.S. 850, Annot., 10 A.L.R.3d 314 (1966).

The defendants argue that the Government's claim rests largely upon LeClair's purported reliance upon information furnished by an informer, and claim such information cannot contribute to probable cause because there was no evidence concerning the reliability of the informant. See Spinelli v. United States, 393 U.S. 410. We do not decide this question, however, since we believe there was ample cause to search the van without the informant's information.

The informant allegedly said that the defendants were in possession of a quantity of glassware. But LeClair was conducting an investigation into an earlier break-in and was aware therefrom that glassware had been taken and once he saw the defendants with a large quantity of glassware, the informant's information became largely immaterial. It would be a different situation if the glassware had been stowed out of sight and was not in plain view. Then if he had decided to search the van, LeClair would have been relying on the informant's information that the defendants had a lot of glassware in their possession. But when he saw the glassware, the defendants' possession became perfectly evident to him, and given the fact that he knew of his own knowledge that glassware had been stolen in earlier break-ins, coupled with the other factors developed by his investigation, the court feels he had probable cause to search the van.

Dated at Burlington in the District of Vermont, this 25th day of June, 1975.

District Judge

FOOTNOTES

1/ 23 V.S.A. § 1204(a)(3) reads as follows:

> (a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating, attempting to operate or in actual physical control of a vehicle on a highway, the amount of alcohol in the person's blood or breath at the time alleged as shown by chemical analysis of the person's blood or breath shall give rise to the following presumptions:
>
> * * *
>
> (3) If there was at that time 0.10 per cent or more by weight of alcohol in the person's blood or breath, as shown by chemical analysis of the person's blood or breath, it shall be presumed that the person was under the influence of intoxicating liquor in violation of section 1201(a)(2) or (3) of this title.

2/ Gibeault's statement of January 21, 1975, was identified at the hearing as Government's Exhibit 1 but inadvertently was not offered. It was subsequently mailed to the court by the Assistant United States Attorney with a request that it be admitted into evidence. In the absence of the opportunity for objection by counsel for the defendants the court would not admit the statement without a hearing on the Government's request for admission. However, before such a hearing could be scheduled defendant Gibeault indicated to the Court that he intended to change his plea. The Court's comment with respect to defendant Gibeault's signature is not prejudicial in any event as the Court's conclusion with respect to the effect of Gibeault's intoxication upon the knowing waiver of his rights stands independently of the Court's observation with respect to his signature on the statement.